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IN THE

Supreme Court of the United States

October Term, 2001

ZELMAN, ET AL / HANNA PERKINS SCHOOL, ET AL./
TAYLOR, SENEL, ET AL.
Petitioners,

v.

SIMMONS-HARRIS, ET AL
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

BRIEF AMICUS CURIAE OF COALITION FOR LOCAL SOVEREIGNTY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Does the Establishment Clause of the First Amendment prohibit state aid to religious schools under a broad based parental choice, voucher plan?

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INTEREST OF AMICUS CURIAE[1]

Coalition for Local Sovereignty is made up of state, local and tribal officials, as well as concerned citizens, working to uphold the principle of local self-government and community based decision making. As the only national organization dedicated exclusively to the restoration of local self-government, we possess a unique perspective on such cases.

Counsels to the petitioners, and counsel to the respondents, have consented to the filing of this *amicus* brief. Consent letters are on file with the Clerk of the Court.

SUMMARY OF ARGUMENT

In *Everson v. Board of Education* (330 U.S. 1 (1947)) the majority opinion declared that "No tax in any amount, large or small, can be levied to support any religious activities or institutions." That statement, if taken literally and carried to its logical conclusion, would prohibit any government aid to religious schools. However, that pronouncement of Justice Black in *Everson*, has been undermine and ignored in subsequent decisions of this Court.

Moreover, members of this Court have repeatedly noted that the *Everson* decision is based on a mistaken reading of the First Amendment, and has resulted in a confusing and conflicting set of precedents.

We believe that in order to review the Constitutionality of state aid to religious schools, the Court should review the entire doctrine of "separation of church and state" (or more properly the "selective incorporation" of the

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[1] This brief was authored by counsel for Coalition for Local Sovereignty, no other person has made any monetary contribution for its preparation or submission.

establishment clause of the First Amendment) first embraced by the majority opinion in *Everson*. We believe a wholesale re-evaluation is necessary in the current case because this Court's Establishment Clause jurisprudence has resulted in such a wide range of seemingly contradictory decisions.

Neither the First Amendment nor the Fourteenth Amendment was ever intended to prohibit government support for religion.

Moreover, the attempt to "incorporate" secularism against the states (whose independence the First Amendment was designed to protect), was adopted by the *Everson* decision with virtually no reflection upon historical or legal antecedent, and actually resulted in a doctrine in conflict with free exercise of religion and conflict with the Tenth Amendment which reserved control of education to the states.

In the current case, the parents' right to freely oversee the religious education of their children (a right recognized in *Pierce v. Society of Sisters*, (268 US 510, (1925)) has been attacked under the auspices of the establishment clause.

The internal inconsistencies and constant interference in local schooling necessitates that this Court review its establishment clause jurisprudence in toto, and suggests the need to explicitly overrule the *Everson* doctrine and its progeny.

ARGUMENT

I. The establishment clause was intended to prevent the establishment of a national church, and reserve matters of religion to the discretion of each State.

In creating the doctrine that the establishment clause was intended to create a separation of religion and government the *Everson* opinion declared, "it is not inappropriate briefly to review the background and environment of the period in which that constitutional

language was fashioned and adopted." Yet apart from selective consideration of the "environment of the period" *Everson* did not examine the language or history of the establishment clause at all.

As distinguished Harvard professor Mary Anne Glendon has written

> With little or no support from text, history, or tradition, the members of the Everson Court braided into the Religion Clause the notions that the establishment provision was meant to create a "wall of separation" between religion and government, that it was broadly construed to prohibit all government aid to religion, and that government was required to be strictly neutral as between religion and nonreligion. The Court thus lent its prestige and sponsorship to a controversial secularizing program without even acknowledging what in hindsight seem obvious and serious interpretive problems.[2]

Everson's claim that the establishment clause should be applied to the states through selective incorporation was an almost completely gratuitous claim based on little more than Madison and Jefferson's opposition to an established church in Virginia, and Jefferson's passing use of the metaphor "wall of separation" Any attempt to examine how Madison and Jefferson understood the First Amendment would have clarified that they, like all scholars of the earlier 19th century, viewed the establishment clause as preserving state supremacy over religion.

As Jefferson wrote in his Kentucky Resolution:

no power over the freedom of religion, freedom of

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[2] Glendon and Yanes, *Structural Free Exercise* (90 Mich. Law Rev., 1991), 485.

> speech, or freedom of the press, being delegated to the United States by the Constitution, nor prohibited by it to the states, *all lawful powers respecting the same did of right remain, and were reserved to the states,* or to the people; that thus was manifested their determination to retain to themselves the right of judging how far the licentiousness of speech and of the press may be abridged without lessening their useful freedom, and how far those abuses which cannot be separated from their use, should be tolerated rather than the use be destroyed; and thus also *they guarded against all abridgment by the United States of the freedom of religious opinions and exercises, and retained to themselves the right of protecting the same.* . . . in addition to this general principle and express declaration, another and more special provision has been made by one of the amendments to the Constitution, which expressly declares, that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech, or of the press," thereby guarding in the same sentence, and under the same words, the *freedom of religion*, of speech, and of the press, insomuch, that whatever violates either, throws down the sanctuary which covers the others, and that libels, falsehoods, and defamations, *equally with heresy and false religion, are withheld from the cognizance of federal tribunals.* [emphasis added].

Similarly Justice Story in his influential *Commentaries on the Constitution* was just as plain in writing that the First Amendment meant "the whole power over the subject of religion is left exclusively to the state governments, to be acted upon according to their own sense of justice, and the state constitutions."

The historical interpretation of the establishment clause offered in *Everson* is so clearly wrong,[3] such a complete rejection of prior precedent, and had been so thoroughly discredited by legal and historical commentary before (and since) the decision, that it is hard to regard the argument offered in *Everson* as anything but a deliberate falsification, unworthy of this great Court.

That historical falsification has been noted at various times by members of this Court. Justice Reed a year after *Everson*, dissenting in *McCollum v Board of Ed.* (303 US 203), exposed the fabrication of the attributing complete separation to Jefferson and Madison. Among other things Justice Reed noted that as Rector of the University of Virginia, when asked to comment on the question of the constitutional limitation upon religious education in public schools Jefferson wrote:

> It was not, however, to be understood that instruction in religious opinion and duties was meant to be precluded by the public authorities, as indifferent to the interests of society. On the contrary, the relations which exist between man and his Maker, and the duties resulting from those relations, are the most interesting and important to every human being, and the most incumbent on his study and investigation.[4]

In his dissent in *Abington School Dist v. Schemp* 374 US 203 (1963) Justice Stewart pointed out

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[3] Laurence Tribe has acknowledged that the original purpose of the establishment clause was "to protect state religious establishments" (*American Const. Law*, 2nd Ed, (1988)), 1161.

[4] *The Writings of Thomas Jefferson* (Memorial edition, 1904), 414.

> [T]he establishment clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would be unable to interfere with existing state establishments. . . . It is not without irony that a constitutional provision evidently designed to leave the states free to go their own way should now have become a restriction on their autonomy.

Chief Justice (then Justice) Rehnquist examined the historical record at some length in his dissent in *Wallace v. Jaffree* (472 US 38, at 98) concluding:

> It seems indisputable from these glimpses of Madison's thinking, as reflected by actions on the floor of the House in 1789, that he saw the Amendment as designed to prohibit the establishment of a national religion, and perhaps to prevent discrimination among sects. He did not see it as requiring neutrality on the part of government between religion and irreligion. Thus the Court's opinion in Everson - while correct in bracketing Madison and Jefferson together in their exertions in their home State leading to the enactment of the Virginia Statute of Religious Liberty - is totally incorrect in suggesting that Madison carried these views onto the floor of the United States House of Representatives when he proposed the language which would ultimately become the Bill of Rights. . . . On the basis of what evidence we have, this statement is demonstrably incorrect as a matter of history. And its repetition in varying forms in succeeding opinions of the Court can give it no more authority than it possesses as a matter of fact; stare decisis may bind courts as to matters of law, but it cannot bind them as to matters of history.

So the Chief Justice concluded that "Whether due to its lack of historical support or its practical unworkability, the *Everson* 'wall' has proved all but useless as a guide to sound constitutional adjudication." Justice Kennedy has even accused the Court in establishment cases of "an Orwellian rewriting of history" (*Allegheny County v. ACLU* (1989)). The *Everson* "wall" is an historical fiction, if not deliberate falsification. Any sound resolution of the current case should begin by recognizing that fact.[5]

II. Because the establishment clause was intended to protect the sovereignty of local governments, the attempt to incorporate the establishment clause against States is logically incoherent.

If *Everson* presented little or no evidence in support of its novel (and demonstrably incorrect) interpretation of the original First Amendment, the move from that understanding to "incorporation" by the Fourteenth Amendment was even more problematic. With no historical analysis or relevant precedents *Everson* simply declared:

> The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed forever to suppress, have been several times elaborated by the decisions of this Court prior to the application of the First Amendment to the

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[5] Some of the majority decisions of the Court have also suggested something similar. In *Lynch v. Donnelly*, 465 U.S. 668 (1984) The Court acknowledged "the [wall] metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state."

> states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the 'establishment of religion' clause.

Actually, there was every reason to treat the establishment clause and the religious liberty clause as completely different, but the *Everson* opinion glossed over all differences between the two clauses by simply asserting that "[t]here is every reason to give the same application."

The selective incorporation of the religious liberty clause created a few years earlier in *Cantwell v Connecticut* (210 US 396 (1940)) offered a rationale which seems especially difficult to apply to the establishment clause (even on the Court's historical re-interpretation of that clause). *Cantwell* declared:

> We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the *liberties* guaranteed by the First Amendment [emphasis added].

Even setting aside the question of whether the Fourteenth Amendment was intended to have (or should have) incorporated the free exercise clause, the establishment clause is of a wholly different nature. The establishment clause unlike the free exercise clause, does not refer to an individual freedom.

The Court has accepted that the free exercise clause and the establishment clause mean different things. The free exercise clause requires a showing of attacking a person's religious freedom, while the establishment clause does not.

Quite specifically in *McGown v. Maryland* (366 U.S. 420 (1961)) challenging Sunday closing laws in Maryland the Court declared:

> appellants allege only economic injury to themselves; they do not allege any infringement of their own religious freedoms due to Sunday closing. . . . appellants do not specifically allege that the statutes infringe upon the religious beliefs of the department store's present or prospective patrons.
>
> Secondly, appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment. *If the purpose of the "establishment" clause was only to insure protection for the "free exercise" of religion,* then what we have said above concerning appellants' standing to raise the "free exercise" contention would appear to be true here. However, the writings of Madison, who was the First Amendment's architect, demonstrate that the establishment of a religion was equally feared because of its tendencies to political tyranny and subversion of civil authority.[6]

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[6] Emphasis added. Many similar statements could be cited, see for example, *Engel v. Vitale*, 370 U.S., at 430: "The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion." At times the Court has suggested that the establishment clause is ultimately intended to protect religious liberty, but if so, then

As Black originally pronounced in *Everson* "we have staked the very existence of our country on the faith that complete separation between the state and religion is *best for the state* and best for religion" (330 U.S. at 59) [emph added].

In *McCollum* the majority declared that "the First Amendment rests upon the premise that both religion and government can best work to achieve their lofty aims if each is left free from the other within its respective sphere." Statements such as these demonstrate that certain opinions of the Court (particularly in the first two decades following *Everson*) advanced the establishment clause as stating a principle of good government, and suggests that certain members of the Court viewed the establishment clause as protecting the state from the corrupting influence of religious entanglement.

Moreover, if the establishment clause were nothing more than a way to protect religious freedom then there could be no conflicts (as the Court has clearly noted that there are). In *Walz v. Tax Commission of New York*, 397 U.S. 664 (1970) the Court declared that "The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other."[7]

So the Court has long considered the purpose of the establishment clause to be something other than (or at least, something more than) protecting religious liberty, and in fact,

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how is it different from the religious liberty clause?

[7] Justices Kennedy and O'Connor have both echoed this. Kennedy in his dissent in *Allegheny* write: "Taken to its logical extreme, some of the language [in establishment cases] would require a relentless extirpation of all contact between government and religion. But that is not the history or the purpose of the Establishment Clause."

admitted that the establishment clause often seemed to reduce religious liberty.

Indeed, in the current case, the establishment clause is being used to attack the freedom of parents to send their children to religious schools. There is not even a suggestion by the Appeals Court that the plaintiffs in the case have had their religious freedom diminished in any way by the fact that some parents were able to use tax dollars to choose schools of their preference.[8] Nor does the Appeals Court ever suggest that the program in any way infringes on any sort of religious freedom. The Circuit Court's opinion is based entirely on its assertion that "states and school boards cannot infringe upon the necessary separation between church and state."

Yet if the establishment clause does not involve protecting the individual liberty of any person, (but is rather to protect the government from religious entanglement) then on what basis can it possibly fall under the Fourteenth Amendment provision that no states shall "deprive any person of liberty without due process"? No one has been deprived of liberty by the Ohio statute.

As Edward Corwin has written:

> So far as the Fourteenth Amendment is concerned, states are entirely free to establish religions, provided they do not deprive anyone of religious liberty. It is only liberty that the Fourteenth Amendment protects. And in this connection it should not be overlooked that contemporary England manages to maintain as complete freedom of religion as exists in this country

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[8] As Justice Reed noted in his dissent in *McCollum*, "It seems obvious that the action of the School Board in permitting religious education in certain grades of the schools by all faiths did not prohibit the free exercise of religion."

alongside an establishment of religion.[9]

Moreover, the Harvard Law Review noted in 1992: "structural differences between the various 'rights' protected by the Bill of Rights may be discerned. Although most of its provisions are meant to protect substantive individual rights, such as the right to free speech, the Establishment Clause is not."[10]

Additionally, Akil Reed Amar has demonstrated, even the most ardent supporters of complete incorporation prior to *Everson* did not see the establishment clause as a candidate for incorporation as something different from protecting religious freedom. Amar points out that Justice Harlan in arguing for incorporation in his dissent in *Maxwell v. Dow* "in canvassing the rights and freedoms of the first amendment, Harlan quoted or paraphrased each of its clauses *except establishment*." Raising serious questions about the incorporation of the establishment clause Amar (who is otherwise a proponent of incorporation) points out: "To infringe upon the free exercise of religion is necessary to invade rights of property and bodily injury, but perhaps not all establishment would do so. Would a simple legislative declaration that 'Utah is a Mormon state' infringe classic common law rights of liberty or property?" (*The Bill of Rights*, 229).

Since the Court has otherwise announced that the criteria for the selective incorporation of parts of the Bill of Rights is that the thing protected is "implicit in the concept of ordered liberty" the establishment clause is a remarkably poor candidate for incorporation.

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[9] Corwin, Supreme Court as National School Board (*Law and Contemp. Problems*, (1949) is. 3, vol 14, p. 19).

[10] Rethinking the Incorporation of the Establishment Clause, NOTES section, 105, Harv. Law Rev. (1992), 1704.

A. The "selective incorporation" of the establishment clause, further makes no sense in terms of freedom "inherent in the idea of ordered liberty," since the establishment clause has often been found to clash with religious liberty.

Black's assertion in *Everson* that "There is every reason to give the same application" to the establishment clause as the free exercise clause also failed to consider previous decisions of the Court that were contradicted by *Everson*, without so much as a sidelong glance. The closest precedent to the current case is actually *Quick Bear v Leupp* (210 US 50 (1908)) which declared that the establishment clause was no barrier to religious schools being paid for out of trust money provided by the federal government to tribal government. Of course, implicit in the decision is that the establishment clause did not even apply to tribal government, which was perfectly free to use tribal money to support religious education. In that respect *Quick Bear* is almost an exact parallel to the current Ohio case. The Court declared in *Quick Bear*:

> we cannot concede the proposition that Indians cannot be allowed to use their own money to educate their children in the schools of their own choice because the government is necessarily undenominational, as it cannot make any law respecting an establishment of religion or prohibiting the free exercise thereof. The court of appeals well said:
> "The 'treaty' and 'trust' moneys are the only moneys that the Indians can lay claim to as matter of right; the only sums on which they are entitled to rely as theirs for education; and while these moneys are not delivered to them in hand, yet the money must not only be provided, but be expended, for their benefit,

> and in part for their education; it seems inconceivable that Congress shall have intended to prohibit them from receiving religious education at their own cost if they desire it; such an intent would be one to prohibit the free exercise of religion amongst the Indians."[11]

It is impossible to square this decision with the complete separation thesis posited by *Everson* and *Lemon*. Yet *Everson* implicitly overturned *Quick Bear* (and indeed reversed at least 75 years of Constitutional jurisprudence) without even bothering to acknowledge the radical departure the decision incorporated.

Moreover, as the Court acknowledged in *Quick Bear*, adopting the secularist position advocated by plaintiffs would have resulted in a position which was "to prohibit the free exercise of religion." Yet it is virtually the same position prohibiting parents from receiving religious education for their children which the Court once called an infringement of free exercise, that the Court is asked to adopt today under the banner of "establishment."

B. Recent Decisions have tended to ameliorate the situation by tying establishment challenges more directly to religious liberty and government coercion.

While many decisions noted above clearly held that "establishment" and "free exercise" were two different and independent values, more recent decisions have indicated that

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[11] 210 US at 81. It is significant that preventing the tribe from paying for religious education the Court explicitly called an act that would "prohibit the free exercise of religion among the Indians" regardless of the fact that parents could still provide religious instruction outside of school (see below p. 25).

the ultimate purpose of the establishment clause is to protect freedom of religion. The Court seems to be moving towards framing establishment challenges in terms of religious liberty. Last term in *Santa Fe* the Court declared "[R]eligious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer" because, the majority found that:

> The Court's analysis is guided by the principles endorsed in *Lee v. Weisman*, 505 U. S. 577. There, in concluding that a prayer delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held that, at a minimum, the Constitution guarantees that government may not *coerce* anyone to support or participate in religion or its exercise." [emphasis added]

The Opinion also noted, "we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of *coercing* those present to participate in an act of religious worship."

Thus the majority in citing *coercion* was able to frame the problem in terms of religious liberty rather than in terms of separation. The *Santa Fe* decision seemed to indicate that the element of coercion involved was a central factor making student led prayer impermissible.[12] This seems to have been a step back from the assertion in *Engel* that "The Establishment Clause, unlike the Free Exercise Clause, does

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[12] The Court has long held coercion to be central to *free exercise* complaints: "[I]t is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion," *Abington School District v. Schempp*, 374 U.S. 203, at 223.

not depend upon any showing of direct governmental compulsion" (370 US at 430).

This is apparently the position advocated by Justice Kennedy in 1989. In his dissent in *Allegheny* he identified coercion as essential proper interpretation of the establishment clause:

> it would be difficult indeed to establish a religion without some measure of more or less subtle coercion, be it in the form of taxation to supply the substantial benefits that would sustain a state-established faith, direct compulsion to observance, or governmental exhortation to religiosity that amounts in fact to proselytizing. It is no surprise that without exception we have invalidated actions that further the interests of religion through the coercive power of government. Forbidden involvements include compelling or coercing participation or attendance at a religious activity. The freedom to worship as one pleases without government interference or oppression is the great object of both the Establishment and the Free Exercise Clauses. Barring all attempts to aid religion through government coercion goes far toward attainment of this object. . . . Absent coercion, the risk of infringement of religious liberty by passive or symbolic accommodation is minimal.

We believe the emphasis on coercion is a move in the right direction. This Court could help clear up much of the conflict and confusion surrounding religion cases by interpreting the establishment clause as supportive of religious freedom, rather than separation as an end in itself, or as protecting government *from* religion. This would entail viewing the establishment clause as prohibiting government coercion of an individual to participate in state sponsored

religious exercises, but would not entail a prohibition on all government support for religion in general.

We believe at very least (if not outright rejecting the "wall of separation") this Court should set up as a rule that protecting freedom of religion must be the guiding principle in First Amendment cases. Plaintiffs would then need to demonstrate how a particular state policy damaged religious liberty, rather than merely asserting that some state policy gives the appearance of supporting religion. Indeed, we believe the Court should reject the view that government must be neutral towards religion, and acknowledge that "supporting religion" is a perfectly appropriate state function, so long as it does not coerce anyone into participating in religious ceremonies.

In cases such as the Ohio school program, where no diminution of religious freedom has even been alleged, and where there is no "compulsion" (such as the Court found in *Santa Fe*) the Court should uphold such practices.

C. The logical incoherence of the establishment "incorporation" has resulted in case law which this Court has described as resulting in "considerable internal inconsistency."

If the Court in *Santa Fe* was attempting to clarify establishment clause precedent by tying it more directly to liberty and government coercion, it has at least thus far failed to make clear any established principles.

Law review articles by the dozen have noted the incoherence and inconsistency of the Court's various establishment clause decisions. No less an authority than Laurence Tribe has written that some of the Court's establishment decisions seem "almost totally whimsical" (Tribe, *Constitutional Choices*, 104). Glendon and Yanes

have written that the Court's establishment jurisprudence "has been described on all sides, and even by the Justices themselves, as unprincipled, incoherent and unworkable" (Struct. Free Ex., 478).

Chief Justice Rehnquist has also noted the obvious contradictions in *Wallace*:

> For example, a State may lend to parochial school children geography textbooks that contain maps of the United States, but the State may not lend maps of the United States for use in geography class. A State may lend textbooks on American colonial history, but it may not lend a film on George Washington, or a film projector to show it in history class.

Perhaps most absurdly, as Justice Kennedy has noted, the Court has found that the "placement of a government-owned creche on private land is lawful while placement of a privately owned creche on public land is not" (dissent in *Allegheny v. ACLU*).

As the Chief Justice went on to explain (at 106):

> If a constitutional theory has no basis in the history of the amendment it seeks to interpret, is difficult to apply and yields unprincipled results, I see little use in it. The "crucible of litigation," has produced only consistent unpredictability, and today's effort is just a continuation of "the sisyphean task of trying to patch together the `blurred, indistinct and variable barrier' described in Lemon v. Kurtzman." Regan, at 671 (STEVENS, J., dissenting). We have done much straining since 1947, but still we admit that we can only "dimly perceive" the Everson wall. Our perception has been clouded not by the Constitution but by the mists of an unnecessary metaphor.
>
> In *Walz* (397 U.S. 664 (1970)) the majority declared,

"In attempting to articulate the scope of the two Religion Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court derives from what, in retrospect, may have been too sweeping utterances on aspects of these clause."

Similarly Justice Kennedy has called parts of the Court's establishment jurisprudence "flawed in its fundamentals and unworkable in practice" (*Allegheny*).

Justice O'Connor has also noted the problems with the separation thesis. In her concurring opinion in *Wallace* (at 82) she declared:

> It is obvious that either of the two Religion Clauses, "if expanded to a logical extreme, would tend to clash with the other." *Walz*. The Court has long exacerbated the conflict by calling for government "neutrality" toward religion. It is difficult to square any notion of "complete neutrality," with the mandate of the Free Exercise Clause that government must sometimes exempt a religious observer from an otherwise generally applicable obligation. A government that confers a benefit on an explicitly religious basis is not neutral toward religion.

Justice O'Connor has quite properly called for a revision of the *Lemon* test, writing:

> the Lemon test has proved problematic. The required inquiry into "entanglement" has been modified and questioned, see Mueller v. Allen, (1983), and in one case we have upheld state action against an Establishment Clause challenge without applying the Lemon test at all. Marsh v. Chambers, (1983). The author of Lemon himself apparently questions the test's general applicability. See Lynch v. Donnelly,

> (1984). . . . I am not ready to abandon all aspects of the Lemon test. I do believe, however, that the standards announced in Lemon should be reexamined and refined in order to make them more useful in achieving the underlying purpose of the First Amendment. We must strive to do more than erect a constitutional "signpost," Hunt v. McNair, (1973), to be followed or ignored in a particular case as our predilections may dictate. Instead, our goal should be "to frame a principle for constitutional adjudication that is not only grounded in the history and language of the first amendment, but one that is also capable of consistent application to the relevant problems."[13]

Justice O'Connor offered good advice, and we believe that after an additional 16 years it has become even more clear that any interpretation "grounded in the history and language of the first amendment" must recognize that neither the framers of the First Amendment nor the rather less gifted framers of the Fourteenth Amendment ever imagined that the establishment clause would ever be applied against the states.

The attempt to incorporate it has led to nothing but confusion and uncertainty. We suggestion for this Court to take the present opportunity to explicitly reject the "wall of separation" metaphor, and acknowledge that nothing in the Constitution prohibits all aid to religious institutions.

D. The establishment clause has been used to raise the

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[13] *Wallace* at 68. In her concurring opinion in *Lynch* Justice O'Connor also noted "It has never been entirely clear, however, how the three parts of the [Lemon] test relate to the principles enshrined in the Establishment Clause."

federal courts to the level of a "national school board" despite the fact that this Court has repeatedly characterized education as a constitutional function pre-eminently local – thus running afoul of the Tenth Amendment

Education in this country has long been considered a function pre-eminently local. This Court has several times announced the importance of local control of education. For example, in *San Antonio School District v. Rodriguez*, 411 U.S. 1 (1973) at a time when the Tenth Amendment was not held in as high esteem by the Court as it is today, the Court declared:

> The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972). MR. JUSTICE STEWART stated there that "[d]irect control over decisions vitally affecting the education of one's children is a need that is strongly felt in our society." Id., at 469. THE CHIEF JUSTICE, in his dissent, agreed that "[l]ocal control is not only vital to continued public support of the schools, but it is of overriding importance from an educational standpoint as well." Id., at 478.
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> ... Pluralism also affords some opportunity for experimentation, innovation, and a healthy competition for educational excellence. An analogy to the Nation-State relationship in our federal system seems uniquely appropriate. Mr. Justice Brandeis identified as one of the peculiar strengths of our form of government each State's freedom to "serve as a laboratory; and try novel social and economic experiments." No area of social concern stands to profit more from a multiplicity of viewpoints and from a diversity of approaches than does public

> education. . . . the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.

We believe these are wise words. The Cleveland voucher program is an experiment in educational reform which should be applauded by advocates of diversity and experimentation. Local attempts to address problems through experimentation should not be straightjacketed by this Court, particularly in an area as uniquely local as education.

Unfortunately, in recent years, federal courts have gotten involved in micro-managing local schools. Prior to 1947 there were very few federal cases involving local schools; and prior to the *Meyer* (262 US 390) Court's discovery in 1923 that the freedom "to acquire useful knowledge, to marry, establish a home and bring up children" were fundamental rights protected by the Fourteenth Amendment there were virtually none. Since the *Everson* decision, however, there has been a virtual explosion of federal court cases micro-managing almost every aspect of local schools, not limited to school prayer and moments of silence but even extending to what courses can be taught, what words it is permissible for a teacher or student to say in class, what books can be used, and what type of art work can be hung on school walls.

While it would be wrong to attribute all of this litigiousness to *Everson*, the establishment line of cases has presented an open invitation for federal courts to interfere in local decisions. As Justice Jackson wrote in his concurring opinion in *McCollum*:

> A Federal Court may interfere with local school authorities only when they invade either a personal

> liberty or a property right protected by the Federal Constitution. . . . The relief demanded in this case is the extraordinary writ of mandamus to tell the local Board of Education what it must do. To me, the sweep and detail of these complaints is a danger signal which warns of the kind of local controversy we will be required to arbitrate if we do not place appropriate limitation on our decision and exact strict compliance with jurisdictional requirements. Nothing but educational confusion and a discrediting of the public school system can result from subjecting it to constant law suits. ...
>
> The task of separating the secular from the religious in education is one of magnitude, intricacy and delicacy. To lay down a sweeping constitutional doctrine as demanded by complainant and apparently approved by the Court, applicable alike to all school boards of the nation, 'to immediately adopt and enforce rules and regulations prohibiting all instruction in and teaching to religious education in all public schools,' is to decree a uniform, rigid and, if we are consistent, an unchanging standard for countless school boards representing and serving highly localized groups which not only differ from each other but which themselves from time to time change attitudes. It seems to me that to do so is to allow zeal for our own ideas of what is good in public instruction to induce us to accept the role of a super board of education for every school district in the nation (333 US at 237).

Justice Jackson's predictions have proven only too correct. This Court in recent years has rediscovered a respect for the Tenth Amendment and the importance and value of state sovereignty. Education is clearly an area of law "reserved to the States or to the people."

In *City of Boerne* (95-2074 (1997)) Justice Kennedy declared that Congress's attempt to protect religious freedom "is not a proper exercise of Congress' §§5 enforcement power because it contradicts vital principles necessary to maintain separation of powers and the federal state balance." Among other problems the Court noted that,

> Its sweeping coverage ensures its intrusion at every level of government, displacing laws and prohibiting official actions of almost every description and regardless of subject matter. ... Any law is subject to challenge at any time by any individual who claims a substantial burden on his or her free exercise of religion.

One could well argue that some of the Court's establishment clause cases have done exactly the same thing, it has contradicted the separation of powers and the federal state balance by bringing into judicial review educational decisions which would otherwise be considered reserved to local school boards. The shear volume of establishment cases has proved that the "blurred, indistinct, and variable" wall which is only "dimly perceived" has guaranteed "its intrusion at every level of government" at any time by any individual who claims an action by local government has not even injured him, but has merely made him feel like an outsider because an action could conceivably have religious significance.

E. The Circuit Court's ruling also interferes with the religious liberty of parents to direct the religious education of their children.

In *Cook v. Hudon*, 429 U.S. 165 (1976) this Court declared "Few familial decisions are as immune from

governmental interference as parents' choice of a school for their children, so long as the school chosen otherwise meets the educational standards imposed by the State." Yet this Court is asked to interfere precisely in the parents' choice of a school for their children. In *Wisconsin v Yoder* this Court declared that "the values of parental direction of the religious upbringing and education of their children in their early and formative years have a high place in our society." The Ohio law is an attempt to give substance and support to these rights of parents to direct the upbringing of their children, while the effect of the Sixth Circuit decision is to negate it.

It has been argued that forcing students to attend secular schools does not interfere with freedom of religion because parents are free to educate their children as they see fit outside of school.[14] As we have noted earlier, the Court implicitly rejected that argument in *Quick Bear*. Moreover, that argument depends upon the assumption that no one's religion *requires* religious education in school. The Catholic Church (the single largest church in the United States) teaches precisely this.

The Canon Law of the Church which binds all Catholics, provides that (Canon 798): "Parents are to send their children to those schools which will provide for their catholic education." The *Catechism of the Catholic Church* section 2229 declares:

> As those first responsible for the education of their children, parents have the right to choose a school for them which corresponds to their own convictions. This right is fundamental. As far as possible *parents*

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[14] Obviously, for example, no one would argue that prohibiting Moslem girls from wearing veils was not an infringement on religious liberty because they are still free to wear veils at home.

have the duty of choosing schools that will best help them in their task as Christian educators.

The Catholic Church allows exceptions to this requirement where local circumstances make it virtually impossible, but it remains a central teaching of the Catholic Church that Catholics should be educated in Catholic schools. The allowance for Catholics under adverse circumstances to avoid sending Catholic children to Catholic schools does resolve the freedom of religion problem, any more than the fact that individual Catholics would be excused from their obligation to attend Mass on Sunday if government prohibition made it too dangerous. Similarly, the fact that Catholic parents can teach religion at other times, besides in elementary school, does not negate the interference in their exercise of religion, since the Catholic religion requires religious content permeate elementary school teaching.

In *Meyer v. Nebraska* (262 US 390 (1923)), the Court rejected the very same argument that prohibiting teaching foreign language in schools did not really inhibit the freedom of parents since they were still free to instruct their children in a foreign language at home.

The Court in *Pierce* said it was a violation of basic Constitutional rights for a state to make it difficult for parents to send their children to parochial schools. It is significant that in the *Pierce* case, the Oregon statute did not completely prohibit parents from sending students to religious schools. The Oregon statute did allow numerous exceptions (Pierce 268 U.S. 510 at 531), yet the Court in *Pierce* ruled:

> we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control. . . . The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state

to standardize its children by forcing them to accept instruction from public teachers only.

The Sixth Circuit ruling that all publically funded education must be secular, is similar to the Oregon statute in that it does not completely prohibit (for example) Catholic parents from following the dictates of their religion and sending their children to Catholic schools, but it makes it a practical impossibility for upwards of 90% of them, and clearly "interferes with" their ability to follow the prescriptions of their church.[15]

We are sensible to the argument that while people (such as Catholics) may feel they have a religious obligation to send their children to a Catholic school, or to attend church on Sunday, that in no way entitles them to the assistance of the government to do so. That certainly is true, they are entitled to no special assistance simply because they believe they have a religious obligation. However, many local governments, for example, run shuttle bus services for the elderly and disabled. A disabled person can schedule a pickup and drop off to go places. What if a local government announced that the disabled program would take a disabled person anywhere except to a religious event? That would be singling out people of faith for discriminatory treatment. That would certainly not be neutrality towards religion. That would be interfering in a person's freedom of religion.

A government service which is generally available to anyone except religious people in the performance of their religious duties would clearly be discriminatory (even

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[15] 90% of Catholics would not send their children to non-Catholic schools were it not for state policies which (at very least) encourage parents to use secular schools, plus a fairly high level of school tax which results in millions of middle class families being unable to afford private religious schools.

Everson acknowledged that). In the Ohio school case, the same scenario applies. A voucher program which is available to send children to any accredited school *except* a religious school, is not neutral towards religion, but discriminates against religion, and interferes with a parent's free exercise.

This point was made by Justice Kennedy in his dissent in *Allegheny* where he noted, "In this century, as the modern administrative state expands to touch the lives of its citizens in such diverse ways and redirects their financial choices through programs of its own, it is difficult to maintain the fiction that requiring government to avoid all assistance to religion can in fairness be viewed as serving the goal of neutrality."

Of course, the public transportation analogy with public schools is not a close parallel. To more properly parallel the situation with public schools, we would need to imagine a special transportation tax (the equivalent of a school tax) which would result in a tax of several thousand dollars a year, a huge government transportation system which would serve almost everyone, and result in the fact that more than 90% of the public could no longer afford private transportation at all. Once government policy had made the vast majority of the public dependant on government transportation, it would then announce that the government would not provide transportation to or from any religious event. It would be difficult to characterize such a hypothetical action by a government as anything but "interfering with religious freedom."

We have suggested that the establishment clause ought to be interpreted as supportive of free exercise not as contradicting it or undermining it. We again suggest that even the most far fetched incorporation of the First Amendment has got to give priority to free exercise over "separation."

CONCLUSION

As Pepperdine University Professor F. LaGard Smith has declared:

> Articles and notes in one respected law review article after another are making the same point. The Clause's incorporation is logically incoherent. If the Court wants a way out of the morass of church-state cases, there is a clear path. It must simply go back to square one, and frankly acknowledge that the incorporation of the Establishment Clause was a terrible call.[16]

The establishment clause cases addressed by this court over the years have involved the court in numerous areas which should have been left to local officials or state legislatures to resolve.

Certain establishment clause decisions have in effect raised the federal courts to a national school board (or indeed as Justice Kennedy has quipped in *Allegheny* "a national theology board"). Yet one need not stop there. One could add "national art board" and "national music board" as federal courts have been called on to decide if certain religious art and music, was sufficiently artistic to justify study in public schools.

Some of the Court's pronouncements on establishment have clearly been "too sweeping" (*Walz*), and are in serious need of re-evaluation and reformulation. Members this Court have repeatedly called into question adherence to the entire "wall of separation" metaphor. Justice Kennedy has written that "Substantial revision of our Establishment Clause doctrine may be in order" (*Allegheny*).

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[16] *ACLU: The Devil's Advocate* (1996), 173.

Perhaps the case was best made by the Chief Justice when he wrote:

> Our recent opinions, many of them hopelessly divided pluralities, have with embarrassing candor conceded that the "wall of separation" is merely a "blurred, indistinct, and variable barrier," which "is not wholly accurate" and can only be "dimly perceived." . . . Whether due to its lack of historical support or its practical unworkability, the Everson "wall" has proved all but useless as a guide to sound constitutional adjudication.

Everson's wall doctrine to the contrary, nothing in the history or text of the First or Fourteenth Amendments prohibits a state from broadly supporting religious institutions, the Court would do well to affirm that principle and overturn the Sixth Circuit decision.

Respectfully Submitted.
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